PUBLIC PROSECUTOR

v.

GAN MASILIMIN

HIGH COURT BORNEO, KOTA KINABALU
SYED AHMAD IDID J
[CRIMINAL TRIAL NO. 6 OF 1985]
14 APRIL 1992

CRIMINAL PROCEDURE: *Dangerous drugs - Whether there was a break in chain of events during custody of exhibits - Expert evidence - Section 114(g) Evidence Act 1950 - Third person not called as witness - Whether fatal to prosecution case - Section 396 Criminal Procedure Code - Onus on prosecution and accused.*

The accused was charged for trafficking 815.22 grammes of cannabis in contravention of s. 39(1)(a) of the Dangerous Drug Act 1952, which was punishable under s. 39B(2) of the same Act. The accused was arrested in an ambush during a "buy - operation" (that is, an operation to buy drugs from persons intending to sell). He was shot at his thigh, when he attempted to escape, before being arrested. A yellow package containing the exhibits was recovered. The defence submitted that there was a break in the chain of events relating to the custody of the cannabis causing a serious gap in the prosecution case. It was also contended that the Chemist is not an expert. In his oral evidence the accused stated that he was framed by the police and that there was another person at the time of the arrest who was not called as a witness by the prosecution. The defence contended that the failure to call the third person was fatal as per s. 114(g) of the Evidence Act.

Held:

[1] The custody of exhibits by the police (when it was handed back by the Chemist) was not up to the standards. However, the redeeming factor was that the exhibit by then had been analysed and examined by the Chemist who issued a certificate to say that he found the analysis to be cannabis. The exhibit was intact and was identified by the Chemist. There was no proof of a break in chain of evidence as to the identity of the exhibit.

[2] The Chemist was accepted as an expert on the basis that he had 17 years of experience in examining and analysing drugs after obtaining a degree and on the basis of having given evidence in several Court cases.

[3] The testimony of the third person might well have thrown some light on some if not all of the accused story. By virtue of s. 396 of the Criminal Procedure Code, the onus of producing such witnesses was on the prosecution as well as the accused. In the present case it is in the interest of the accused to summon the third person. The decision to call a witness or not is always the right of the prosecution.

[4] The accused was found guilty of the charge under s. 39B(1)(a) of the Dangerous Drugs Act.

[Accused found guilty, convicted and sentenced to death.]

Cases referred to:

Mohd. Osman bin Pawan v. PP [1989] 1 CLJ (Rep) 108 ***(cons)***
Abdul Jalil bin Abdul Satar v. PP [1991] 1 CLJ (Rep) 1 ***(cons)***
Teoh Hoe Chye v. PP [1987] CLJ (Rep) 386 ***(cons)***

PP v. Chew Yoo Choi [1990] 2 MLJ 444 ***(cons)***
Abdullah bin Yaacob v. PP [1991] 1 CLJ (Rep) 5 ***(cit)***
PP v. Abu Bakar bin Abdul Malek @ Mohd Yunus a/l Sumania [1990] 2 CLJ (Rep) 674 ***(dist)***
PP v. Chong Wei Kian [1990] 3 MLJ 165; [1990] 2 CLJ (Rep) 690
Wong Chop Saow v. Public Prosecutor [1965] 1 MLJ 274 ***(cit)***

Legislation referred to:
Criminal Procedure Code, ss. 277, 396
Dangerous Drugs Act 1952, ss. 37(d), (da), (vi), 39B(1)(a), (2), 40A, (1)
Evidence Act 1950, s. 114(g)

For the public prosecutor - Abdul Gani Patail SFC
For the defence counsel - Valentine Willie (Yee Pui Hing with him); M/s. Skinner Lind Robertson Willie Wong & Chin

JUDGMENT

Syed Ahmad Idid J:

On 10 September 1991, the accused was charged as hereunder:

> That you on 12 February 1985, at about 11.20 a.m. at Kampong Likas, in the District of Kota Kinabalu, in the State of Sabah, did on your own behalf, traffic in a dangerous drug, to wit 815.22 grammes of cannabis, and that you have thereby committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1983) and punishable under s. 39B(2) of the same Act.

and on his pleading not guilty, the prosecution commenced its case.

PW1 (Ermand Durasit) informed the Court that on 12 February 1985 at 10.00 a.m. he was at the Ibu Pejabat Polis Kepayan when his superior, Supt. Zainal (PW6) who was then a DSP, told him of a "buy-operation" (that is, an operation to buy drugs from persons intending to sell) expected to take place at Kg. Likas. The other person present was Constable 104102 Abdul Manap bin Ismail (PW2). Both PW1 and PW2 went to the area and hid themselves.

They then saw Inspector Rosdi's (PW7) car arriving and parked. At about 11.10 a.m. PW1 saw a male (whom he later identified as the accused) going towards PW7's car and upon reaching it, talking to PW7. The man then went away but returned to PW7 with a yellow package. When PW7 gave the signal with flashes of his brake lights (indicating that the package contained drugs), PW1 and PW2 rushed towards the male, who upon seeing their advance, started to run. PW1 shouted "Polis, Jangan Lari" but the male continued to run. It was at this time that PW1, using MP5, a submachine gun, set at single-firing, aimed at the man and shot him at his right thigh. PW1 was a marksman of the Special Unit. The male fell when he was shot. Manap (PW2) handcuffed him. When Supt. Zainal (PW6) arrived, both PW1 and PW2 had left the scene taking the man (since identified as the accused) with them to the hospital. PW2 confirmed substantially what PW1 had said.

Two surprising items stood out, that is, PW2 could not remember the exact scene and on cross-examination he said he did not see any signal from PW7 when PW1 and he rushed out. He, however, confirmed that he handcuffed the accused.

During cross-examination, the doubt regarding from where Supt. Zainal had emerged was raised by Mr. Willie.

PW3, the Senior Government Chemist, gave expert evidence. As he has had about 17 years of experience in examining and analysing drug after his obtaining a degree and of having given evidence in several Court cases, I accepted him as an expert. He explained the three

tests (i) Duquenois Levine test; (ii) Thin Layer Chromotography (TLC); and (iii) Microscopic test on the 95 grammes out of the 815.22 grammes of the "dry vegetable matter" which, according to the other witnesses', they seized. This was identified as Exh. P5f and the other parts of the packaging as Exh. P5a, b, c, d and e. PW3 received the package from Insp. Lee Si Hoong (PW4) on 13 February 1985 at 2.30 p.m. and after the three tests, he returned the sealed package to the same officer on 6 March 1985 at 9.20 a.m. with the chemist report (Exhibit P4). The marking he assigned to the package was 'Lab 451/85'.

The cross-examination went towards attempting to discredit the witness in that no one had told him he succeeded after his 1½ years of in-service training in his Petaling Jaya Headquarters. The learned defence Counsel also raised issues on the tests, e.g. whether the tests were presumptive or conclusive. Counsel raised the evidence in *PP v. Aning bin Paradji* criminal trial in 1986 where prosecution witness (PW3) was alleged to have agreed that "the microscopic test was not conclusive". The prosecution witness, however, could not remember having said that. Counsel put to him the serious possibility of the TLC examination giving an incorrect answer if there was contamination of the solvent and/or the chemicals and/or the plates used. There was also the question of eliminating false positives which witness could not remember if he did. PW3 ended by saying that "in this particular case I was satisfied the items were cannabis resins". He also issued a chemist report.

PW4, Inspector Lee Si Hoong, attached to Anti-Vice, Secret Society and Gambling Section informed the Court that he received a call at about 11.30 a.m. that day from DSP (now Superintendent) Zainal (or PW6) and accordingly he went to Kg. Likas where they met and he was handed a yellow plastic bag (exhibit P5c). He packed the bag, Chinese newspaper and the other items and wrapped them in a piece of brown paper (which he identified in Court as Exh. P5b). He held the exhibits in his custody at all time and testified that there was no tampering since then; then he handed the exhibits to the Senior Government Chemist (PW3) for examination and analysis. He later on 6 March 1985 received the Exh. back from PW3 with a chemist report. This Exh. (P5a-f) he kept under his custody until he took to the Court for the trial on 10 September 1991. The cross-examination of this witness was intended to show a break in the chain of custody of the exhibits but the evidence was clear as to the seizure of the drugs by the then DSP Zainal at the scene, its handing to PW4 and then to PW3 and subsequent custody of it by PW4 again.

At this stage I must say that I found the custody of the exhibit by the police as rather not up to the standards expected, that is, PW4 left the exhibits in the store albeit under the charge of the Sergeant but he did not personally hand them over to a particular officer of similar or superior rank to take charge. However, the redeeming feature was that the exhibit by then had been analysed and examined by the Senior Government Chemist who had issued a certificate to say that he "found (a slab of dried vegetable matter weighing 815.22 grammes) on analysis to be cannabis ... as defined in the Dangerous Drugs (Amendment) Act, 1983." He dated the report 13 February 1985, provided the Laboratory Number as 451/85, police report No. 2185/85 (Balai Kota Kinabalu) and stated that it was for attention of "1/9913 Lee Si Hoong." The seals were intact when the exhibit was tendered in Court.

Sergeant Harris or Harrith, the Exhibit Store Supervisor, received the exhibit after the Chemist had analysed it and made a report on it. His evidence was on the storage of the exhibit until the Court trial began. My observation is that there can be a better method of passing control. The Sergeant (PW5) surprisingly claimed "Barang-barang kes di Exhibit Store, tidak ada orang lain ada kunci. Saya sendiri. Jika saya sakit, saya beri kepada Timbalan OCPD. Jika cuti pun saya mesti datang ke Stor." In this case Inspector Lee had satisfied the Court as to the

exhibits which he received from DSP Zainal and which DSP Zainal had recovered from the scene of the shooting and seizure of the drugs. Still it is proper to place responsibility to certain individuals when the supervisor is away on leave or sick. The cross-examination of this witness, in my opinion, did not detract from my observations above.

Let me cite here some relevant parts of Mr. Willie's submissions on (i) the reliability (by which he meant the unreliability) of prosecution witnesses and (ii) the adverse inferences to be drawn against the prosecution. At the conclusion of the prosecution case, Mr. Willie strenuously submitted on the break in the chain of evidence. He traced the dates and times/ periods and the people connected to the custody of the cannabis from its seizure in vegetable form, to its examination and analysis, then on to its certification as cannabis and eventual return into the custody of the police, in particular Inspector Lee Si Hoong (or PW4). Mr. Willie, learned Counsel for the accused, attacked Inspecor Lee for "the cavalier manner in which exhibits had been handled by him." But there was no proof the police had created a break in the chain of evidence as to the identity of the package (Exh. P5). This Court strongly urge all prosecution authorities to heed the advice of Datuk Mohamed Yusof SCJ, in the case of *Mohd. Osman Bin Pawan v. PP* [1989] 1 CLJ (Rep) 108 at p. 111:

> "In a serious case such as this, it is pertinent, to emphasise again that investigation officers should not treat the custody of exhibits lightly ..." I would have accepted Mr. Willie's submission:

It is humbly submitted that from the evidence of PW4 Insp. Lee Si Hoong, it is clear that as he has been transferred to police Headquarters in Kepayan in July 1987, he has no charge of the case nor the package which was stored at the Karamunsing exhibit store. And as he also stated that he handed over all cases including this case to ASP Lim Ket Kong since July 1987, it is obvious that ASP Lim Ket Kong is the officer in charge of the case and the package from that date until its production in Court on 12 September 1991. It is improbable and even unthinkable for an officer posted to a different station to be still in charge of exhibits in another station. In fact, he admitted that since 6 March 1985 when the package was returned from the Chemist to the store, the person who had custody of the package is really the store keeper or whoever had the key to the store at Karamunsing exhibit store from time to time. And if, as it is submitted, ASP Lim Ket Kong was the person having charge of this case and all exhibits related to the case during the period between July 1985 and 10 September 1991, the failure of the prosecution to call ASP Lim Ket Kong give rise to a serious gap in the prosecution's case.

But in Court, what was vital was that the "package" (Exh. P5) was intact and was identified by the Senior Chemist who recognised the seals and laboratory number. The other police personnel also identified the pink strings (Exh. P5a), brown paper (Exh. P5b), partly torn yellow plastic bag (Exh. P5c), the Chinese newspaper (Exh. P5d) and the Portland Cement brown bag (Exh. P5e). I had considered the defence citation of cases including those of *Abdul Jalil Bin Abdul Satar v. PP* [1991] 1 CLJ (Rep) 1; *Teoh Hoe Chye v. PP* [1987] CLJ (Rep) 386 SC; *PP v. Chew Yoo Choi* [1990] 2 MLJ 444; *Abdullah Bin Yaacob v. PP* [1991] 1 CLJ (Rep) 5 SC. In particular I reminded myself of the warning from Tan Sri Abdul Hamid, CJ (as the Lord President then was) in *Teoh Hoe Chye v. PP* [1987] CLJ (Rep) 386:

> ... it behoves us to reiterate that 'the requirement of strict proof in a criminal case' cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the Court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else ...

I then ruled, at the end of prosecution's case after the defence submission of no case to answer, as follows:

1. I have listened to the seven prosecution witnesses who gave evidence and of their cross-examination from 10 to 13 September 1991.

2. I have also listened to Mr. Willie's submission of no case to answer at the end of the prosecution case. Mr. Willie chose only to argue on the question of doubts regarding "the chain of evidence" in respect of the exhibits, that is the drugs or the cannabis. Mr. Willie submitted that there was a break in the chain. He claimed that "it was clear that there was serious gap in the evidence relating to the identity of the drugs." He urged the Court to acquit the accused on the strength of *PP v. Chew Yoo Choi* [1990] 2 MLJ 444.

3. I find that the instant case and the findings of *Public Prosecutor v. Chew Yoo Choi (supra)* are different: there the Court found the evidence of the Investigating Officer was "far from satisfactory".

4. This Court accepts the recent Supreme Court judgment of *Abdullah Bin Yaacob v. PP* where Hashim Yeop A. Sani CJ (Malaya), "stressed the requirements of the law on the custody and control of the exhibits ..." I have paid attention to this area of the police activity and evidence.

5. In our case, the evidence pointed to the seizure, the handing over of the drugs from PW7 to PW6 to PW4 on to PW5 for storage in the Exhibits store. It was PW4, Inspector Lee Si Hoong who, on 13 February 1985, personally handed the package marked "X" and sealed "POLIS DI-RAJA MALAYSIA 313" to En. Khalid Safan (the Senior Government Chemist). The contents of the package were then examined and analysed by En. Khalid who then issued a report (Exh. P4) dated 28 February 1985. The package was then sealed with "JABATAN KIMIA, CAWANGAN SABAH, MALAYSIA". At that point of time, the evidence clearly showed that there were no missing links or any serious gaps in the chain of evidence or of possession and control of the exhibits by the police officers and the senior Chemist. It was clearly borne out in the evidence that the accused was the person who had been identified as having been in possession at the time of his arrest.

6. The learned Senior Federal Counsel, En. Abdul Ghani Bin Patail, submitted that the authorities cited by the learned defence Counsel were in respect of the position of the drugs before they were sent to the Chemist. In other words, during that period the police or customs officers had not been careful with their taking charge of the drugs from the time of seizure to the time of handing over to the Chemist for examination and confirmation that such goods were really dangerous drugs.

7. At this stage, on the principles of *Haw Tua Tau*, it is the duty of the Court to be satisfied that there was some evidence which was not inherently incredible to satisfy the ingredients of the offence with which the accused was charged. I am satisfied that the evidence showed a *prima facie* case against the accused which, if it is unrebutted, would warrant a conviction. I rule that there is a case to answer and I call upon the accused under s. 180 of the Criminal Procedure Code to answer the charge. The defence is now invited to open their case in accordance with s. 181 of the Criminal Procedure Code.

Defence

The defence only had the accused as a witness. He elected to give evidence on oath. His story is one of using the date and places to fit into the other part of prosecution evidence. The accused told the Court that on the day in question, 12 February 1985, a red car approached him at the Pelabuhan where he waited for a job. He recognised one of the two men in the red car as Mohd. alias Yusri who called him. He did not know who the other was only until he came to Court. That other, according to the accused, was Rosdi (PW7).

Yusri, according to the accused, made an appointment for the accused to meet him at 11 a.m. near the Tuaran bus workshop and gave him RM100. When Yusri gave the accused a "plastik beg warna kuning", accused said he declined as he feared the bag would be lost. He added that Yusri asked him to take the yellow plastic bag to the appointed place.

When he got to near the workshop, he heard a car honking and he saw the red car again, this time with three men, including Yusri, who then threw a yellow plastic bag out of the car into some bushes. Yusri, according to the accused, asked him several times to retrieve the plastic bag. Accused refused and thereupon three men emerged from the bushes and shot him while the red car drove away. He identified one of the police officers as Insp. Herman (or Ermand?). According to the accused, Insp. Ermand pointed a gun at him and asked him to pick up the plastic bag. He became scared and so he did so as ordered. He handed the bag to the driver in a white car whom he said was Rosdi. The other two were Harry and someone who looked like an Indian. Accused said Harry used to visit accused father's house "untuk belajar ilmu".

The accused accused the police of having framed him. One strong point in his favour was the absence of Yosuri/Yusri. This person was not called by the prosecution nor offered to the defence. In *PP v. Abu Bakar bin Abdul Malek @ Mohd. Yunus a/l Sumania* [1990] 2 CLJ (Rep) 674, Dato' Mohtar bin Abdullah JC (as His Lordship then was) held that:

> The hasty decision on the part of the police 'to get rid of a material witness in such a serious case' even before the Public Prosecutor has time to issue his consent for the prosecution of the accused, gives rise to some nagging doubt as to the reasons.

In that case, the "material witness" was (i) at the scene of the arrest; (ii) carried the bag in which was the heroin and (iii) handed the bag to the agent provocateur. But here it is different in that Yusri was nowhere at the scene and neither did he carry nor was he seen with the exhibits (Exh.P5).

The defence raised matters of some doubts in the prosecution case, e.g.:

(i) ... it is highly improbable that neither Insp. Ermand nor DSP Zainal could recall which of them planned the operation.

(ii) PW2 - ... his entire evidence is to say the least unreliable even though the witness himself is not untruthful.

(iii) PW3 - the Senior Government Chemist:

  (a) was not a botanist nor a taxonomist;

  (b) his specialist subject at University was organic chemistry, which is a different field altogether;

  (c) ... by admitting that he didn't carry out any test to eliminate the 'false positives' cannot be certain beyond a reasonable doubt that the TLC test results were not caused by contamination.

(iv) PW7 - key witness ... also the agent provocateur ... even though by virtue of s. 40A of the Dangerous Drugs Act he is not presumed to be unworthy of credit, it behoves the Court to treat his testimony with great circumspection. Section 40A(1) does not presume him to be credit worthy. This is a major distinction.

(v) PW6 - this witness contradicted the evidence of PW1 as to who planned the operation.

I am of the view these doubts are not crucial to the main question regarding the arrest of accused and the seizure of the drugs.

The defence argued that it was "incredible that the two arresting officers were hiding next to each other before the ambush and that this was an unbelievably super efficient operation ..."

Defence contended that the failure to call Yusri (or Yosuri) was fatal as by s. 114(g) of the Evidence Act, there is a presumption that "evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it." While there is s. 396 of the Criminal Procedure Code to cater for such an eventuality, the onus is on the Public Prosecutor as well as on the accused. And it is confined to "persons bound to give evidence". In the present case, it was also in the accused's interest to summon Yusri as, if his evidence is to be believed, it was Yusri who had suggested they meet at the Tuaran bus workshop and it was Yusri who held the "yellow plastic bag". On this, we can distinguish the case of *PP v. Abu Bakar bin Abdul Malek* [1990] 2 CLJ (Rep) 674 and as Yusri was more a defence witness, s. 114(g) cannot be invoked against the prosecution. I agree with Mr. Willie that "the testimony of Yusuri (Yusli) might well have thrown some light on some if not all of his (accused's) story." But it must be remembered that the decision whether to call a witness or not is always the right of the prosecution.

There was a slight question of certain photographs but I accept the learned Senior Federal Counsel's words that "there were photographs taken (of the exhibits) but they were not relevant." Even if I accept that photographs had been taken while accused was carrying the "incriminating bag" (to use the learned defence Counsel's description) as the prosecution did not tender them, they cannot become exhibits. On the other hand, if they had been tendered, these "incriminating photos" (again to use Mr. Willie's words) would be more against the interests of the accused.

Consideration by Court

While it is true that it is not the function of the defence to prove the innocence of the accused person, it is the function of the Court to consider the evidence given by the prosecution and compare with that of the accused and his witnesses, if any. In as far as this trial Court is concerned, its duty is essentially to decide whether on the evidence before it the prosecution has proved its case and if there is/are unsatisfactory feature(s) in the case, it can determine whether, in the light or dimness of such features, the prosecution falls short of proof beyond reasonable doubt. In the circumstances of this case, there was no break in the chain of evidence (as the drugs were accounted for, the marked and sealed exhibits were intact and in each aspect, were identified).

The evidence before me clearly established that the accused was at the scene of the crime, that he held the yellow plastic bag which on examination showed it contained cannabis. The accused's version that it was Yusri who enticed him to the scene is, to my mind not material at best and not to be believed. The accused's version that he was compelled to hold the yellow plastic bag is again an attempt to explain how he came to be with the drugs. There is a similarity in this case to that of *Mohd. Osman bin Pawan v. PP* [1989] 1 CLJ (Rep) 108 in that the two accused were in possession of "yellow plastic bags". To my mind the evidence also established that the accused knew that the contents of the plastic bag were drugs and that caused him to run. And according to PW1, "saya menembak apabila says sedang berlari mengejar dia" (that is, the accused). PW1 used a firearm MP5, a sort of automatic submachine gun which was set to single firing. Accused was running and only stopped when he was

shot and injured. If indeed he was not guilty, he would have remained at the spot as he would not know what the contents were.

Under s. 37(da) of the Dangerous Drugs Act 1952, once I hold that the accused was in possession of the cannabis, the presumption of trafficking will come into play. See *PP v. Chong Wei Kian* [1990] 3 MLJ 165 which at Held 1(1) mentions s. 39B 1(a). I was satisfied with the expert witness, Encik Khalid Safan, who gave his evidence in accordance with the advice of the late Mr. Justice Hashim in *Wong Chop Saow v. PP* [1965] 1 MLJ 247. I had considered the defence and the evidence given by the accused on his behalf and came to the conclusion that the accused was merely trying to dove-tail his story to fit into the times and places stated in the prosecution evidence but he added some explanation to mislead this Court. Unlike the case of *Abdullah bin Yaacob v. PP* [1991] 1 CLJ (Rep) 5, where the police witnesses gave evidence concerning the probability of another person running away, here in the instant case there was no such other person on whom the accused could deflect the blame on.

By s. 37(d), when the accused was found to have had in his custody or control any dangerous drugs he is deemed to have been in possession of such drug and deemed to have known the nature of such drug. Accused was in possession of 815.22 grammes of cannabis. By s. 37(da)(vi) any person who is found in possession of "200 grammes or more in weight of cannabis" shall be presumed to be trafficking in such drug. Trafficking includes keeping, concealing, buying, selling, giving, receiving, carrying, delivering, supplying or distributing any dangerous drugs.

I find the accused guilty of the charge under s. 39B(1)(a) of the Dangerous Drugs Act and accordingly I convict him.

Before I pass the mandatory sentence, I invite the learned defence Counsel to say anything he wishes touching the accused in this case.

(*NOTE*: Recording in the book what learned defence Counsel wishes to say).

By s. 39B(2) of the Dangerous Drugs Act, I sentence the accused to death. By s. 277 of the Criminal Procedure Code, I direct that he be hanged until dead.

I direct that all exhibits be returned to the Senior Federal Counsel and the police for destruction after the appeal.

Also found at [1992] 4 CLJ 1896